Supreme Court, U.S.
FILED
DEC 18 1996
CLERK

No. 96-776

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

BOARD OF EDUCATION OF THE ENLARGED CITY SCHOOL DISTRICT OF THE CITY OF WATERVLIET, NEW YORK,
Petitioner,

-v-

COLLEEN RUSSMAN, A CHILD WITH DISABILITIES, BY HER PARENTS, PATRICIA AND PAUL RUSSMAN,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Nancy M. Maurer
(Counsel of Record)
Joseph M. Connors
Disabilities Law Clinic
Albany Law School
80 New Scotland Avenue
Albany, New York 12208-3494
(518) 445-2328 Fax: (518) 434-8612

QUESTION PRESENTED

Whether certiorari should be granted to a review a question petitioner specifically conceded below as to the responsibilities of school districts, pursuant to the Individuals With Disabilities Education Act, to provide on-site services to students with disabilities in private schools when such services are not prohibited by the Establishment Clause.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities v

Respondent's Brief in Opposition 1

Jurisdiction 1

Statutory and Regulatory Provisions. 2

Statement of the Case 4

Facts of the Case 4

The Decision Below 7

Reasons for Denying the Petition 8

1. Certiorari should be denied in this case since the petitioner specifically conceded in open court the only issue it seeks to review. 8

a. The school district conceded below that the IDEA mandates services to children with disabilities in private schools, as long as there is no Establishment Clause prohibition. . . . 9

TABLE OF CONTENTS - Continued

Page

b. Since the school district does not seek review of the Court's holding that the Establishment Clause is no bar to the provision of IDEA services on the premises of a private sectarian school, this defense is also waived 11

c. There is no case or controversy between the parties presently before this Court 12

2. The petition should be denied because the record below is inadequate to fully address the application of the IDEA and regulations with respect to children with disabilities voluntarily enrolled in private school. 13

a. There are no facts or evidence in the record to support the school district's denial of services to Colleen Russman pursuant to the IDEA, since the denial has always be premised on the Establishment Clause. 13

b. The decision of the Court of Appeals requiring the school district to provide Colleen Russman with a consultant teacher and aide at St. Brigid's in accordance with the IDEA, was based on the school district's failure to make any factual claim that such services are not required 15

TABLE OF CONTENTS - Continued

Page

3. Because the Court of Appeals decision in this case is correct, it should remain undisturbed . . 16

4. Petitioner fails to show a conflict in the Circuits which would affect Colleen's right to receive special education services at the private parochial school. 19

Conclusion 23

APPENDIX A - Text of selected regulations . . . 1ra

APPENDIX B - Portion of Transcript of Oral Argument before the United States Court of Appeals for the Second Circuit, February 1, 1996 . . . . 5ra

APPENDIX C - Letter to U.S. Court of Appeals dated May 7,1996 . . . . . 8ra

TABLE OF AUTHORITIES

Page

Cases

Application of Board of Educ. of the City of New York, 24 Ed. Dept. Rep. 155 (1984) 21

Bd. of Ed. of the Monroe-Woodbury Cent. School Dist. v. Weider, 72 N.Y.2d 174 (1988) 21

California v. San Pablo & T.R. and Co., 149 U.S. 308 (1893) 13

Cefalu v. East Baton Rouge Parish School Bd., 907 F.Supp. 966 (M.D. La. 1995) 20, 22

City of Canton v. Harris, 489 U.S. 378 (1989) 9

Fowler v. Unified School Dist. No. 259, 900 F.Supp. 1540 (D. Kan. 1995) 22

Goodall v. Stafford County Sch. Dist., 930 F.2d 363 (4th Cir.), *cert. denied* 502 U.S. 864 (1991) 20

K.R. v. Anderson Community School Corp., 81 F.3d 673 (7th Cir. 1996) 12, 20, 22

Magnum Co. v. Coty, 262 U.S. 159 (1923) 8

Massachusetts v. Painter, 389 U.S. 560 (1968) 14

McNair v. Cardimone, 676 F.Supp. 1361 (S.D. Ohio 1987), *aff'd on other grounds*, 872 F.2d 153 (6th Cir. 1989) 22

TABLE OF AUTHORITIES - Continued

Page

Mills v. Green, 159 U.S. 651 (1895) 13

Monrose v. Carbon Black, Inc., 359 U.S. 180 (1959) . 8

Moose Lodge No. 17 v. Iris, 407 U.S. 167 (1972) . . . 9

Mueller v. Allen, 463 U.S. 388 (1983) 19

Natchez-Adams School Dist. v. Searing, 918 F.Supp 1028 (S.D. Miss. 1996) 22

Poe v. Ullman, 367 U.S. 497 (1961) 13

Preiser v. Newkirk, 422 U.S. 395 (1975) 13

Rosenberger v. Rector and Visitors of Univ. of Virginia, 115 S. Ct. 2510 (1995) 19

Rose v. Mitchell, 443 U.S. 545 (1979) 9-10

Tribble v. Montgomery County Board of Educ., 798 F.Supp. 668 (M.D. Ala. 1992) 22

U.S. BanCorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994) 13

Wainwright v. City of New Orleans, 392 U.S. 598 (1968) 14

TABLE OF AUTHORITIES - Continued

Page

Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481 (1986) 19

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 10, 11. 19, 20

Constitutional Authorities

Article III, §2, Cl. 1, United States Constitution . 2, 13
First Amendment, United States Constitution 5-6

Statutory Authorities

Individuals with Disabilities Education Act
20 U.S.C. §§1400 et seq 2, 4
20 U.S.C. §1413 . . . . . 5, 17
20 U.S.C. §1413(a)(4)(a) 16
20 U.S.C. §1400(c) 2
New York Educ. L. §3602-c 4, 5, 21
New York Educ. L. §3602-c(1)(a) 21
New York Educ. L. §3602-c(1)(d) 21
New York Educ. L. §3602-c(2) 4, 20-21

Regulatory Authorities

34 C.F.R. Part 300 2
34 C.F.R. §300.452 2
34 C.F.R. §76.532 20
34 C.F.R. §76.650 (a) 3
34 C.F.R. §76.652 . . . . . 3, 14
34 C.F.R. §76.653 3

TABLE OF AUTHORITIES - Continued

	Page
34 C.F.R. §76.654	3, 17-18
34 C.F.R. §76.655	3
34 C.F.R. §76.656	3
34 C.F.R. §76.657	3
34 C.F.R. §76.658	3
34 C.F.R. §76.659	3

Other Authorities

Supreme Court Rule 10	8
Supreme Court Rule 14.1	11

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Colleen Russman, requests that the Court deny the Petition for a Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Second Circuit. The Court of Appeals opinion is reported at 85 F.3d 1050 and reproduced as Appendix A to the Petition for a Writ of Certiorari at 1a-16a.

The opinion of the United States District Court for the Northern District of New York is reported at 22 IDELR 1028 (1995) and is reproduced as Appendix B to the Petition at 17a-29a. The opinion of the Magistrate Judge of the United States District Court for the Northern District of New York is reported at 22 IDELR 1 (1994) and reproduced as Appendix D to the Petition at 32a-47a. The decision of the New York State Review Officer is reported at 22 IDELR 731 (1993) and reproduced as Appendix E at 48a-62a.

JURISDICTION

Petitioner presents no justiciable controversy. Since the petitioner has effectively waived its constitutional claim and conceded its statutory claim below, there is no case or controversy for this Court to review.

STATUTORY AND REGULATORY PROVISIONS

The relevant constitutional, statutory and regulatory provisions in addition to those indicated by petitioner include the following:

United States Constitution, Article III, §2, Cl. 1.
The judicial power shall extend to all cases in law and equity arising under this Constitution, the Laws of the United States, ... —to Controversies ... between a State, or the Citizens thereof ... .

Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq.
20 U.S.C. §1400(c) Purpose. It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

Education of Children with Disabilities (IDEA) Regulations, 34 C.F.R. Part 300

34 C.F.R. §300.452 Each L[ocal] E[ducational] A[gency] shall provide special education and related services designed

to meet the needs of private school children with disabilities residing in the jurisdiction of the agency. (The word "designed" was omitted from petitioner's statement.)

Education Division General Administrative Regulations (EDGAR) 34 C.F.R. Part 76.[1]

§76.650 (a)	**Private schools; purpose of Secs. 76.651-76.652.**
§76.652	**Consultation with representatives of private school students.**
§76.653	**Needs, number of students, and types of services.**
§76.654	**Benefits for private school students.** **§76.654(b) Same benefits** **§76.654(c) Different benefits**
§76.655	**Level of expenditures for students enrolled in private schools.**
§76.656	**Information in an application for a subgrant.**
§76.657	**Separate classes prohibited.**
§76.658	**Funds not to benefit a private school.**
§76.659	**Use of public school personnel.**

[1]The full text of the following regulations is set forth in Appendix A.

New York Education Law §3602-c(2)
Boards of Education of all school districts of the State shall furnish services to pupils who are residents of the state and who attend nonpublic schools located in such school districts, upon the written request of the parent, ...

STATEMENT OF THE CASE

The main issue to be considered by this Court is whether the petitioner school district, after admitting before the Court of Appeals that it is required pursuant to the IDEA to provide on-site supportive services to children with disabilities attending private schools, can now resurrect its abandoned claim and assert that the IDEA does not require such services.

Facts of the Case

The respondent, Colleen Russman, is a child with disabilities who seeks supportive educational services from her school district, the Enlarged City School District of the City of Watervliet (school district) pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, and New York Education Law §3602-c so that she may attend a private parochial school with her siblings. There is no dispute between the parties as to the nature of Colleen's disability or the nature of the services she should receive. The parties agree that Colleen should be in a inclusion program in which she is educated with same age peers in a regular classroom. The parties also agree that in order to benefit from her education, Colleen requires the

services of a part-time special education consultant teacher to modify academic curriculum, a teaching aide to provide individual support in academic areas, and speech and occupational therapy. The parties disagree, however, as to where the services must be provided. The school district has refused to provide Colleen the support services she needs at St. Brigid's Regional Catholic School (St. Brigid's), thereby forcing her to forgo her private placement.[2]

Starting in 1991, Colleen, through her parents, commenced due process proceedings, including two impartial hearings and appeals to the State Review Officer of the New York State Education Department, in order to contest the school district's denial of services at the private school. In July of 1993, after exhausting administrative remedies, Colleen commenced this action in the United States District Court challenging the denial of services as violating her rights under the Individuals With Disabilities Education Act (IDEA) 20 U.S.C. §1413, New York Education Law §3602-c, and the Free Exercise Clause of the First Amendment to the United States Constitution.

Contrary to the school district's present assertions, the refusal to provide services to Colleen at St. Brigid's has always been based solely on its alleged concern that such on-site assistance is prohibited by the Establishment Clause of the First Amendment, and not on its "understanding that nothing in the federal or state law required the District to provide on-site services." (Petition at 6.) As the record

---

[2]Colleen, now 15 years old and in 9th grade in the Watervliet public schools, is no longer eligible to attend St. Brigid's which serves grades kindergarten through eighth grade. Since Colleen is still school age, however, her parents may elect to send her to a different private school in the future.

reflects, the Establishment Clause is the only explanation ever offered by the school district for its refusal to implement Colleen's program at the private school.

The State Review Officer observed in his 1993 decision, for instance, that:

> [w]hile the CSE [school district's Committee on Special Education] did not offer any explanation for its recommendation that the IEP could not be implemented, it is readily apparent from the minutes of the CSE meetings and the position taken by [the school district] at the hearing that the CSE refrained from recommending that the services of a consultant teacher and aide be provided on the premises of St. Brigid's because it believed that [the school district] was precluded from providing those services at the private school. (P. App. E at 56a.)

Moreover, the school district specifically conceded in oral argument before the Second Circuit that the Establishment Clause was the sole reason for refusing services to Colleen. In response to questions from the Second Circuit panel, Stephen Bailly, counsel for the district, stated as follows:

Judge Walker:	In the argument you are making, you don't seem to be contesting the fact that if this were not a parochial school, if it were just a private school, nonsectarian, that you would be required to provide such services; is that correct?
Mr.Bailly:	That is correct.

Judge Walker: So your defense is solely based on the Establishment question.

Mr. Bailly: Yes your Honor. That is why I am addressing it now.

(Transcript of Oral Argument, R. App. B at 6ra-7ra.)

The Decision Below

The United States Court of Appeals for the Second Circuit held that the Establishment Clause presents no bar to the on-site provision of special education and related services to children with disabilities attending private religious schools. The Court found that:

> [t]he only reason offered by the district for the denial of services is its view that the Establishment Clause prohibits the on-site provision of such services at a parochial school... (P. App. A at 15a-16a.)

The school district does not challenge the Court's holding on the Establishment Clause.

The Court of Appeals also addressed the requirements of the IDEA in its decision and determined that, pursuant to the IDEA, Colleen Russman is entitled to receive the special education support services which the parties agree are necessary and appropriate for her, on the site of the private school selected by her parents. The Court of Appeals stressed in this discussion that "the statute and regulations require necessary services be provided to private school children according to their needs rather than the name of their school." (P. App. A at 14a.)

The Court, "[did] not take the position that the IDEA requires the on-site provision at private schools of any and all services that might be required in the context of public education..." (P. App. A at 12a.) The Court stated, however, that school districts may deny on-site services only when providing services at the private school "would entail significant additional costs..." (P. App. A at 14a.)

Although the school district agreed before the Court of Appeals that the IDEA requires that services be provided at the private school, this is the only question raised by the district for writ of certiorari.

REASONS FOR DENYING THE PETITION

1. CERTIORARI SHOULD BE DENIED IN THIS CASE SINCE THE PETITIONER SPECIFICALLY CONCEDED IN OPEN COURT THE ONLY ISSUE IT SEEKS TO REVIEW.

This Court has made clear that, out of necessity, its jurisdiction to review cases by way of certiorari is quite limited. The Court's jurisdiction was not designed to "merely ... give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923). Indeed, Supreme Court Rule 10 limits certiorari to cases in which a petitioner presents "special and important" reasons. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." *Monrose v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

Certiorari should be denied in the case at hand because the petitioner has not presented any ongoing issue in this litigation. Instead, the petitioner attempts to seek another hearing on an issue it conceded in the court below.

a. The school district conceded below that the IDEA mandates services to children with disabilities in private schools, as long as there is no Establishment Clause prohibition.

The school district admitted before the United States Court of Appeals for the Second Circuit that it is required to provide IDEA services on site to private school pupils with disabilities. (R. App. B at 5ra, Partial Transcript of Oral Argument.) Having conceded this point below, the district should be precluded from now seeking a writ of certiorari on the same issue before the United States Supreme Court.

This Court has stated that it will deny certiorari where, as here, the petitioner concedes the issue in question. *See, e.g., City of Canton v. Harris*, 489 U.S. 378 (1989). In *Canton*, the petitioner, a municipal defendant in a civil rights action, conceded below that inadequate training is a means of establishing municipal liability, but later challenged this conclusion in its petition for certiorari. Although the Supreme Court accepted review of this case, the Court indicated that certiorari may have been denied had the petitioner's concessions been brought to the Court's attention. *Canton* at 385. Likewise, in *Moose Lodge No. 17 v. Iris*, 407 U.S. 167, 170 (1972), the Court explained that an explicit renunciation of a claim justifies a conclusion that there is no longer a "case or controversy concerning that claim." See also, *Rose v. Mitchell*, 443 U.S. 545, 573-74

(1979) (Normally, a "flat concession" might be given preclusive effect.)

Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), a case much like the present, the school district was precluded from raising alternative statutory defenses to its failure to provide a sign language interpreter pursuant to the IDEA to a child with hearing impairments attending a private parochial school. As in the present case, the *Zobrest* school district refused to provide the interpreter, arguing that it was precluded from doing so by the Establishment Clause of the First Amendment. The school district attempted to argue for the first time before this Court that, even if the Establishment Clause does not bar the provision of the requested service on site, the IDEA and regulations do not require it. This Court, however, declined to consider the statutory defenses and limited its review to the constitutional issues which had been the basis of the school district's position all along.

As this Court noted in *Zobrest*, "[the district] may well have waived these other defenses. For in response to an interrogatory asking why it had refused to provide the requested service, [the district] referred only to the putative Establishment Clause bar." *Id.* at n.6. The Court further pointed out that:

> In our view, this belated contention [regarding the IDEA] is entitled to little, if any, weight here given respondent's repeated concession that, but for the perceived federal constitutional bar, it would have willingly provided [the child] with an interpreter at [the parochial school] as a matter of local policy. *Id.* at n.8.

In the present case, the Watervliet School District made the identical concession regarding the IDEA before the Court of Appeals for the Second Circuit. Within the first minutes of oral argument, counsel for the school district conceded that the IDEA requires the school district to provide services to the respondent, Colleen Russman, on site at the private school selected by her parents. Counsel further acknowledged that its sole defense for not providing such services to Colleen was the Establishment Clause of the First Amendment. (R. App. B at 5ra, Partial Transcript of Oral Argument.)

The school district clearly acknowledges that the IDEA mandates services to students with disabilities who, like Colleen Russman, seek to attend private schools. The school district, having abandoned its claim below that such services are only discretionary, should not now be permitted to resurrect the issue before the Supreme Court. Like the school district in *Zobrest*, Watervliet has waived this defense.

b. Since the school district does not seek review of the Court's holding that the Establishment Clause is no bar to the provision of IDEA services on the premises of a private sectarian school, this defense is also waived.

Supreme Court Rule 14.1 provides that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Since the school district does not present any question related to the constitutional issues in this case, such issues are also waived.

The Court of Appeals stated in its decision, "the only reason offered by the district for the denial of services is its view that the Establishment Clause prohibits the on-site provision of such services at a parochial school, an issue disposed of above." (P. App. A at 15a-16a.) Since the Establishment Clause issue was resolved by the Second Circuit, and the district does not challenge this holding, there is no reason to review the decision of the Second Circuit Court of Appeals at all.

The school district's petition for writ of certiorari on the IDEA is merely an attempt to change its legal position in light of the recent decision from the United States Court of Appeals for the Seventh Circuit in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996). In view of the district's acceptance of the IDEA mandate, however, *K.R. v. Anderson* should have no impact.[3]

This Court should not overlook the fact that the Establishment Clause was the underlying reason for the dispute in the first place, yet it is not even raised in this petition. The school district should not be permitted to confuse the issues before the Court by switching the rationale for its decision and failing to disclose its prior concessions.

c. There is no case or controversy between the parties presently before this Court.

By conceding that the IDEA does indeed mandate services to private school children with disabilities, and by

---

[3] Respondent has consistently asserted the *KR v. Anderson* should have no bearing on the Court's decision. (R. App. C at 8ra, Letter dated May 7, 1996 from Respondent's counsel to the U.S. Court of Appeals.)

failing to seek review of the Court of Appeals determination that the provision of services in question is constitutional, the school district has in essence rendered this case moot. There is no case or controversy between the parties left to be determined.

Article III of the United States Constitution limits judicial power to review of "cases" and "controversies." It is well established that the judiciary is limited to determining rights and obligations between parties that are actually controverted. *See e.g., U.S. BanCorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994),(citing *Mills v. Green*, 159 U.S. 651, 653 (1895)); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); and *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (citing *California v. San Pablo & T.R. and Co.*, 149 U.S. 308, 314 (1893)). Because the petitioner school district has conceded the single issue over which it seeks certiorari, there simply is no justiciable controversy between the parties.

2. THE PETITION SHOULD BE DENIED BECAUSE THE RECORD BELOW IS INADEQUATE TO FULLY ADDRESS THE APPLICATION OF THE IDEA AND REGULATIONS WITH RESPECT TO CHILDREN WITH DISABILITIES VOLUNTARILY ENROLLED IN PRIVATE SCHOOL.

a. There are no facts or evidence in the record to support the school district's denial of services to Colleen Russman pursuant to the IDEA, since the denial has always be premised on the Establishment Clause.

This Court has held that a writ of certiorari should not be granted "where the record is not sufficiently clear and specific to permit decision" of the issues involved in the case. *Massachusetts v. Painter*, 389 U.S. 560, 561 (1968). A record which is "too opaque" or "too sketchy" does not provide the Court with enough information to adequately resolve an important federal issue. *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968).

As discussed above, throughout this litigation, the sole rationale offered for denying IDEA services to Colleen has been the Establishment Clause, and not the IDEA. Consequently, the record below contains few facts or allegations specific to the requirements of the IDEA or regulations.[4] Despite the comprehensive statutory and regulatory scheme, there is virtually no record in this case with regard to the school district's conduct pursuant to that scheme.

The State Review Officer stated, for example, that "the CSE did not offer any explanation for its recommendation that the IEP could not be implemented [at the private school]...." (P. App. E at 56a.) The State Review Officer also observed that the school district recommended a program that it believed "could not be implemented if the child attended St. Brigid's.... I find that the [district's] recommendation for Colleen is inherently contradictory ...." (P. App. E at 55a.)

---

[4] For example, 34 C.F.R. §76.652 requires districts to consult with representatives of private school students in order to determine, among other things, which children require benefits, the children's needs, and the types of benefits to be provided. The record is silent with regard to any such consultation or compliance.

The lack of a full record concerning the school district's rationale for not providing special education services on site at a private school, makes the case at hand an inappropriate one for establishing any national precedent affecting children with disabilities.

b. The decision of the Court of Appeals requiring the school district to provide Colleen Russman with a consultant teacher and aide at St. Brigid's in accordance with the IDEA, was based on the school district's failure to make any factual claim that such services are not required.

The Court of Appeals identified several factors to be considered pursuant to the IDEA in determining the nature and location of services to children with disabilities attending private schools. The first factor is the child's particular needs. As the Court noted, there is no dispute as to appropriate program, needs or services for Colleen in this case. (P. App. A at 4a.) Another factor is cost. The Court determined that school districts have discretion to deny on-site provision of services at a private school where "economies of scale in providing the services at one place exist" or "where significant additional costs" attend the provision of services at the private location. (P App. A at 4a.) In this case, the Court found:

> [t]urning specifically to the facts of the present case, no claim is made by the school district that providing Colleen Russman with a teaching consultant and teaching aide at St. Brigid's is significantly more expensive than providing the same services at the public school. (P. App. A at 15a.)

The school district offered no rationale for denying services to Colleen under the IDEA. There was no indication that providing services on site would be problematic, costly, or ineffective. Since the Court of Appeals' ruling was limited to the specific circumstances of this case, it need not be reviewed.

3. BECAUSE THE COURT OF APPEALS DECISION IN THIS CASE IS CORRECT, IT SHOULD REMAIN UNDISTURBED.

The school district misconstrues both the substance and basis of the Court of Appeals decision. As is evident from the decision itself, the Court of Appeals' reasoning is based on the purpose and plain language of the IDEA and accompanying regulations in their entirety, and not, as the school district asserts, "on its own singular interpretation of an isolated regulatory provision." (Petition at 12.)

The Court of Appeals relies on the statute, 20 U.S.C. §1413(a)(4)(a), and notes:

> [t]he statute imposes somewhat different obligations regarding disabled children who are voluntarily placed in private school. It requires states to 'provid[e] for such children special education and related services.' However, this obligation is limited by the phrase 'to the extent consistent with the number and location of' such children in a state. (P. App. A at 9a.)

It is this specific statutory language which provides the foundation for the Second Circuit Court of Appeals decision.

The Second Circuit finds that the school district's discretion to refuse to provide services on site to private school children is limited pursuant to the IDEA, 20 U.S.C. §1413 and the regulations to instances in which, due to numbers and location of students with disabilities, "economies of scale in providing the services at one place exist" or "provision of services at a distant private school would entail significant additional costs... ". (P. App. A at 14a.) As the Court states:

> Where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools. The statute and regulations require that necessary services be provided to disabled private school students according to their needs rather than the name of their school.... (P. App. A at 14a.)

The school district incorrectly characterizes the Court of Appeals' decision as based solely on the regulation requiring "comparability in quality, scope, and opportunity for participation to the program benefits that the [district] provides for students enrolled in public school." 34 C.F.R. §76.654(a). (Petition at 12) The Court does indeed refer to the EDGAR "comparability" regulation. However, this regulation is consistent with, and further supports, the Court's analysis of the IDEA scheme as a whole. The Court states:

> Use of the word 'comparable' strongly suggests that the provision of services will usually take place outside the public school. Otherwise, the regulation would simply provide that any services for the disabled available at a public school must be open to private school students. (P. App. A at 15a.)

Further, the Second Circuit does not state, as the school district suggests, that "comparable benefits" must be "identical." (Petition at 15.) In fact, the Court confirms that, "...we do not take the position that the IDEA requires the on-site provision at private schools of any and all services that might be required in the context of public education..." (P. App. A at 12a.)

The interpretation of the IDEA now urged upon the Court by the school district in this case is inconsistent with the very purpose of the IDEA. Nowhere in the statute or regulations, as the petitioner argues, are school districts given full and unfettered discretion to deny without reason, essential special educational or related services to children with disabilities because they attend private school. As the Court of Appeals concludes:

> [i]f public school authorities may freely refuse to provide such benefits at private school, therefore, disabled students must either forgo the IDEA benefits, bear their cost, or transfer to the public school. This result, however, seems to be precisely what the statute and regulations seek to preclude. Indeed, the principal purpose of the statutory and regulatory commands appears to make a child's disability irrelevant to the family's

choice of school, at least where differences in costs of provision do not exist. (P. App. A at 15a.)

4. PETITIONER FAILS TO SHOW A CONFLICT IN THE CIRCUITS WHICH WOULD AFFECT COLLEEN'S RIGHT TO RECEIVE SPECIAL EDUCATION SERVICES AT THE PRIVATE PAROCHIAL SCHOOL.

Since the school district conceded that, but for their First Amendment objections, they would provide services to Colleen at a parochial school pursuant to the IDEA, any discussion by the Court as to Colleen's rights under the IDEA is dicta and does not conflict with the direct holding from other circuits.

The only issue that really needed to be addressed by the Court of Appeals to dispose of this case was whether the school district is prohibited by the Establishment Clause from providing IDEA services, specifically a special education consultant and a teaching aide on the site of a parochial school. The Court of Appeals held that such services are constitutional. This decision is fully consistent with well established Supreme Court precedent including *Zobrest*, 509 U.S. 1 (1993); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); and *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 115 S. Ct. 2510 (1995).

Since *Zobrest*, there has been no conflict in the Circuits with regard to the impact of the Establishment Clause on the receipt of IDEA services at private sectarian

schools. The Seventh Circuit in *K.R. v. Anderson*, 81 F.3d 673 (7th Cir. 1996), did not address the Establishment Clause even though K.R. attends a religious school. Similarly, the District Court in *Cefalu v. East Baton Rouge Parish School Bd.*, 907 F. Supp. 966 (M.D. La. 1995), a case presently on appeal to the Fifth Circuit, did not address a constitutional issue although the child attended a religious school. The only decision in potential conflict is *Goodall v. Stafford County Sch. Dist.*, 930 F.2d 363 (4th Cir.), *cert. denied* 502 U.S. 864 (1991), which was decided prior to *Zobrest* and on statutory grounds. As the Second Circuit recognizes, *Goodall* is "unpersuasive." (P. App. A at 12a.) Central to the *Goodall* decision denying a sign language interpreter at a parochial school, was the Court's interpretation of 34 C.F.R. §76.532 which prohibits the use of IDEA funds for religious instruction. Since *Zobrest* determined that this regulation is co-extensive with the Establishment Clause, it did not impose any stricter limitation on IDEA funds. *Zobrest*, 509 U.S. at 7 n.7. In any event, the Second Circuit's decision on the Establishment Clause, the only holding below critical to the resolution of this particular case, is not questioned by the petitioner and, therefore, does not warrant review.

Even if this court finds that there is a conflict in the circuits with regard to the IDEA, this case is not the proper vehicle for review because the outcome would be the same regardless of any federal conflict due to Colleen's right to receive the on-site services she needs pursuant to New York State Law. New York Education Law specifically requires school districts to furnish special education services to meet the needs of children with disabilities in non-public schools. N.Y. Educ. L.§

3602-c(2).[5]778 In light of the requirements of State law, even if this Court accepts review and reverses on the federal statute, it is unlikely that such a reversal will affect the position of the parties. The matter would be remanded back for decision regarding New York State claims, and Colleen would again be likely to succeed.

To the extent that the Supreme Court finds that there is a conflict in the circuits, and deems it necessary to clarify the requirements of the IDEA and regulations with respect to pupils in private schools, this Court should do so in the

---

[5] N.Y. Education Law §3602-c(2) provides that boards of education, "... shall furnish services to pupils who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent...." N.Y. Educ. L. §3602-c(2) (McKinney 1995). Services include "education for students with handicapping conditions" which is further defined as the provision of special education programs that are designed to meet the needs of children with handicapping conditions. §§3602-c(1)(a) and 3602-c(1)(d). See also, *Application of Board of Educ. of City of New York*, 24 Ed. Dept. Rep. 155, 158-159 (1984), in which the Commissioner of the N.Y. Education Department held that under federal and state law, a school district must provide necessary related services without requiring that a student forgo her private school enrollment.

The petitioner's description of New York Education Law §3602-c as the dual-enrollment law is incorrect. (Petition at 7-8, n.1) The statute provides for services for students at private schools whether or not such students are dually enrolled. The petitioner also misconstrues *Bd. of Ed. of the Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174 (1988), in which the New York Court of Appeals interprets §3602-c as neither mandating nor prohibiting the provision of services solely at the public schools. *Id.* at 186. *Wieder* held that the regulatory scheme contemplates that the "placement of children in programs will be guided generally by their individual educational needs in the least restrictive environment." *Id.* at 188.

context of the Seventh Circuit's decision in *K.R. v. Anderson* or in the context of potential cases presently in litigation in other Courts of Appeals. Two recent district court decisions support the Second Circuit's decision in this case. *See, e.g. Cefalu v. East Baton Rouge Parish School Bd.*, 907 F. Supp. 966 (M.D. La. 1995) presently on appeal to the Fifth Circuit, and *Fowler v. Unified School Dist. No. 259*, 900 F. Supp. 1540 (D. Kan. 1995) on appeal to the Tenth Circuit.[6] One of these cases may provide a better opportunity for the Supreme Court to examine the requirements of the IDEA as applied to private school students with disabilities.

---

[6] Petitioner mistakenly observes that other federal district courts, specifically *Tribble v. Montgomery County Board of Educ.*, 798 F. Supp. 668 (M.D. Ala. 1992) (vacated after Joint Motion to dismiss appeal granted (1993)) and *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd on other grounds*, 872 F.2d 153 (6th Cir. 1989), have reached different conclusions to *Fowler* and *Cefalu* regarding the IDEA. *Tribble*, in fact, is fully consistent with *Cefalu* and *Fowler*. *Tribble* determined that "the language and clear intent of the IDEA require that where a child... is placed in a private school or program by his parents the local education agency remains responsible for providing that child with related services required by a particular child's needs." *Tribble* at 672. *Tribble* did not, however, request on-site services. In *McNair*, the court of appeals affirmed the decision denying IDEA services to the child in question due to the fact that the services requested were not related to the disability, but rejected the rationale of the district court. *Id.* at 156. *See also, Natchez-Adams School Dist. v. Searing*, 918 F.Supp 1028 (S.D. Miss. 1996) (private school student entitled to on-site occupational therapy).

CONCLUSION

As argued above, the decision of the Second Circuit is correct and should stand. More significantly, the case at hand is fraught with jurisdictional problems based on the school district's concession concerning the issue challenged. In addition, the record in this case is undeveloped with regard to the school district's compliance with the IDEA and its rationale pursuant to the IDEA for refusing to provide Colleen Russman the services she needs. The substantive and procedural difficulties presented by this case make it inappropriate for Supreme Court review.

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

Nancy M. Maurer
(Counsel of Record)
Joseph M. Connors
Disabilities Law Clinic
Albany Law School
80 New Scotland Avenue
Albany, New York 12208-3494
(518) 445-2328 Fax: (518) 434-8612

Dated: Albany, New York
December 18, 1996

APPENDIX

APPENDIX A

34 C.F.R. §76.650 Private schools; purpose of Secs. 76.651-76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Secs. 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

34 C.F.R. §76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate repre-sentatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

34 C.F.R. §76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

34 C.F.R. §76.654

(b) *Same Benefits*. If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

34 C.F.R. §76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives the benefits under the program.

(b) The subgrantee shall spend a different average amount on a program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

34 C.F.R. §76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with §76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

34 C.F.R. §76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

34 C.F.R. §76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:
(1) The needs of a private school; or
(2) The general needs of the students enrolled in a private school.

34 C.F.R. §76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities.
(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and
(b) If those benefits are not normally provided by the private school.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---x

IN THE MATTER OF THE APPEAL OF
COLLEEN RUSSMAN, A CHILD WITH
DISABILITIES, BY HER PARENTS,
PATRICIA AND PAUL RUSSMAN,
Plaintiffs-Appellees,

-against- Docket No. 95-7756

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL DISTRICT
OF THE CITY OF WATERVLIET,
Defendant-Appellant

and

THOMAS SOBOL, as Commissioner
of the New York State Education
Department,
Defendant.

---x

February 1, 1996

Before:

HON. RALPH K. WINTER
HON. JAMES L. OAKES
HON. JOHN M. WALKER, JR.,
Circuit Judges

APPEARANCES:

DISABILITIES LAW CLINIC OF ALBANY LAW SCHOOL
Attorneys for Plaintiffs-Appellees
BY: NANCY M. MAURER
CORY HAINES, Law Intern

HICKS & BAILLY
Attorneys for Defendant-Appellant Board of Education
BY: STEPHEN F. BAILLY

PAGE 2/

JUDGE WINTER: We will hear Russman against Board of Education.

MR. BAILLY: May it please the Court, my name is Stephen Bailly and I am here representing the Watervliet City School District. I would like to address the constitutional issue that has been raised on this appeal.

The district judge below improperly interpreted the *Zobrest* decision of the United States Supreme Court in holding that the school district is required to provide a consulting teacher and full-time student aide to the plaintiff, Colleen Russman, a disabled child –

JUDGE WALKER: In the argument you are making, you don't seem to be contesting the fact that if this were not a parochial school, if it were just a private school, nonsectarian, that you would be required to provide the services, is that correct?

MR. BAILLY: That is correct.

JUDGE WALKER: So your defense is solely based on the Establishment question.

MR. BAILLY: Yes, your Honor. That is why I am addressing it now.

JUDGE WALKER: My question is, here the

choice that was made to have a teacher's aide and consultant was that of the parents, it was not emanating from the state; correct?

PAGE 20/

I ~~(We)~~ hereby certify that the foregoing is a true and accurate transcript, to the best of my ~~(our)~~ skill and ability, from my ~~(our)~~ stenographic notes of this proceeding.

/s/ William Cohen

Official Court Reporter
U.S. District Court

APPENDIX C

[seal]
ALBANY LAW SCHOOL
Disabilities Law Clinic

May 7, 1996

United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

Re: Russman v. Bd. of Ed. of City of Watervliet
Docket No. 95-7756
Argued February 1, 1996
Hon. Winter, Walker and Oakes

Dear Sirs:

This is in response to Appellant, Watervliet School District's letter dated May 2, 1996 advising this Court of the recent decision of the Seventh Circuit in *K.R. v. Anderson Community School Corporation*. This decision should have no bearing on the present case.

The Appellant School District conceded in oral argument that it would have provided a special education consultant and teaching aide to Colleen Russman, a child seeking to attend a private parochial school, if not for the District's concern regarding the Establishment Clause of the First Amendment. Such services are clearly contemplated by the Individuals With Disabilities Education Act (IDEA). Appellant's position is similar to that of the school district in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993). In *Zobrest*, the district had agreed to provide IDEA services to a child at a private parochial school if permitted to do so pursuant to the Establishment Clause. The district was

later precluded from arguing that it should be excused from providing such IDEA services based on an alternate theory that the services are not mandatory. As in *Zobrest*, the Watervliet School District here should be similarly precluded from changing its position after oral argument.

page 2/

In any case, the recent decision in *K.R.* does not address the requirements of New York Education Law. As argued in Appellee's Brief on Appeal, pursuant to N.Y. Ed. Law Section 3602-c, Colleen is entitled to receive the special education services she seeks at the private school of her choice.

Thank you for your consideration.

Sincerely,

/s/ Nancy M. Maurer

Nancy M. Maurer
Attorney for Appellee,
Colleen Russman

cc: Stephen F. Bailly